

**Colazzo v Ponte**

2019 NY Slip Op 32766(U)

September 20, 2019

Supreme Court, New York County

Docket Number: 154614/2018

Judge: Barbara Jaffe

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

<b>PRESENT:</b> <u>HON. BARBARA JAFFE</u>	<b>PART</b>	<b>IAS MOTION 12EFM</b>
<i>Justice</i>		
-----X	<b>INDEX NO.</b>	<u>154614/2018</u>
TONINO COLAZZO, DANIELLE COLAZZO, NICHOLAS COLAZZO,	<b>MOTION DATE</b>	_____
Plaintiffs,	<b>MOTION SEQ. NO.</b>	<u>002</u>

- v -

VINCENT PONTE, VINCENT PONTE, CHARLES  
JACOBSON, KEVIN SHERIDAN, PONTE STEAK  
HOUSE INC., 270 WEST STREET, LLC, JOHN DOE  
ENTITIES,

Defendants.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 41-47, 63-76  
were read on this motion for reargument.

Plaintiffs move pursuant to CPLR 2221(d) for an order granting leave to reargue  
defendants' motion to dismiss to the limited extent of the dismissal of its cause of action for  
unjust enrichment. Defendants oppose and cross move pursuant to CPLR 3211(a)(7) for an order  
dismissing certain claims. Plaintiffs oppose.

I. PROCEDURAL BACKGROUND

By decision and order dated April 26, 2019 (NYSCEF 44), I granted defendants' motion  
to dismiss to the extent of ordering:

- (1) that the claims as to the 12.5 percent ownership interest in defendant Almavi  
Enterprises LLC held by the Estate of Marguerite Colazzo be severed and dismissed with  
leave to refile in the proper court;
- (2) dismissal of the cause of action for unjust enrichment; and

(3) that plaintiffs serve and file an amended complaint in which

(a) the cause of action for unjust enrichment is omitted,

(b) Tonino Colazzo is named as a plaintiff for only the causes of action for intentional infliction of emotional distress and aiding and abetting the intentional infliction of emotional distress,

(c) the cause of action for intentional infliction of emotional distress is repleaded in compliance with CPLR 3016(b) to contain only the allegations of the forgery of Tonino's signature on a sworn and notarized document submitted to the local diocese, the false advice to the local diocese that Marguerite and Tonino had divorced, and the secret arrangement for the diocese to have Marguerite Colazzo's married name removed from her burial crypt, and

(d) defendant Almavi Enterprises LLC is not named as a defendant.

The cause of action for unjust enrichment was dismissed based on plaintiffs' failure to specify in their complaint how defendants were enriched at plaintiffs' expense and because in opposing defendants' motion to dismiss, they did not articulate a specific argument against dismissal, in effect, abandoning their opposition to dismissal of that claim. (*Id.*).

On May 16, 2019, plaintiffs efiled their first amended complaint. In the caption, Tonino is named "individually and as Executor of the Estate of Maguerite [sic] Colazzo." The prefatory section follows:

Plaintiff Tonino Colazzo ("**Plaintiff Executor**" or "**Plaintiff Husband**"), individually, as executor of the Estate of Maguerite Colazzo (respectively, the "**Decedent Estate**" or the "**Estate**" and "**Decedent**") and as an interest holder in the Ponte Family Companies (as

defined below); plaintiff Danielle Colazzo (“**Plaintiff Daughter**”), individually, as a beneficiary of the Estate, as a beneficiary the Ponte Family Trusts (as defined below), and as an interest holder in the Ponte Family Companies (as defined below); and plaintiff Nicholas Colazzo (“**Plaintiff Son**”), individually, as a beneficiary of the Estate, as a beneficiary the Ponte Family Trusts (as defined below), and as an interest holder in the Ponte Family Companies (as defined below) (together, Plaintiff Son and Plaintiff Daughter are referred to as the “**Plaintiff Children**” and, together with the Estate, collectively referred to in their individual and representative capacities as “**Plaintiffs**” or “**Plaintiff Family**”), . . .

(NYSCEF 66 [bolds in original]). Tonino, as “plaintiff husband” is solely named as a plaintiff in the 14th and 15th causes of action for intentional infliction of emotional distress and aiding and abetting an intentional infliction of emotional distress. (*Id.*).

## II. MOTION TO REARGUE

### A. Contentions

In support of reargument, plaintiffs maintain that “much of the alleged wrongdoing by Defendants necessarily enriched Defendants at the expense of Plaintiffs,” and that the complaint is “replete with allegations that Defendants wrongfully utilized the assets of the Ponte Family Companies and Trusts in which Plaintiffs hold interest, for their own benefit, and to the exclusion of Plaintiffs.” (NYSCEF 42). They argue that dismissal of the cause of action for unjust enrichment is unwarranted because defendants’ arguments in support of their motion were bald and conclusory, in that they were unsupported by legal authority or “meaningful analysis.” Plaintiffs add that their arguments were misapprehended. Those arguments, they assert, are based on the “same facial defects” pervading defendants’ motion which “very clearly apply to” the claim for unjust enrichment. According to plaintiffs, defendants had failed to sustain their burden of demonstrating that the claim should be dismissed.

In opposition, defendants observe that plaintiffs’ references to sections of their opposition papers pertaining to other of their causes of action fall short in that they failed then, as they do

now, to identify specifically how defendants were enriched at their expense. In failing to identify any specific allegation, defendants argue, plaintiffs do not demonstrate what was allegedly overlooked or misapprehended. (NYSCEF 70).

### B. Analysis

A motion for leave to reargue “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.” (CPLR 2221[d][2]). Whether to grant re-argument is committed to the sound discretion of the court, and a motion to re-argue may not “serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided.” (*Foley v Roche*, 68 AD2d 558, 567-568 [1st Dept 1979], *lv denied* 56 NY2d 507 [1982]).

Here, plaintiffs claim that their arguments were misapprehended is based on my alleged failure to ferret out the facts allegedly supporting their cause of action for unjust enrichment from the 237 paragraphs of their complaint. And they persist in failing to identify those facts here. Consequently, plaintiffs do not demonstrate any misapprehension. That complaints are to be liberally construed does not excuse their failure. (*Simkin v Blank*, 19 NY3d 46, 51 [2012] [“allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration”] [citation omitted]; *Rios v Tiny Giants Daycare, Inc.*, 135 AD3d 845 [2d Dept 2016] [court properly dismissed complaint as conclusory allegations insufficient to state claim; although pleadings must be afforded liberal construction on motion to dismiss, allegations that are vague and conclusory or consist of bare legal conclusions insufficient]).

### III. CROSS MOTION TO DISMISS

#### A. Contentions

Defendants argue that the first amended complaint should be dismissed to the extent that it contains claims on behalf of Tonino as against a trust, trustee or trust asset. Not only does the complaint fail to conform with the April 2019 order, they observe, but plaintiffs do not seek to reargue the issue of Tonino's lack of standing to assert claims against defendants trustees and do not dispute that the sole causes of action which do not relate to the trust or estate property are those for intentional infliction. (NYSCEF 70).

In opposition, plaintiffs deny that the first amended complaint does not conform with the April 2019 order, alleging that the first paragraph therein clearly omits Tonino from the group of plaintiffs composed of plaintiff daughter, plaintiff son (collectively, plaintiff children), together with the estate (collectively plaintiffs or plaintiff family). (NYSCEF 73).

In reply, defendants newly argue that because the estate has no interest in any trust or trust asset, it has no standing or right to prosecute those claims. Rather, those claims may be brought only by plaintiff children, and if the estate has any such claims, they should be brought by Tonino as executor in the Richmond County Surrogate's Court. (NYSCEF 76).

#### B. Analysis

As defendants' cross motion is directed solely to an aspect of the first amended complaint and not to the original complaint, it is not barred by CPLR 3211(e). (*Bailey v Peerstate Equity Fund, LP*, 126 AD3d 738, 739 [2d Dept 2015] [as cause of action asserted in amended complaint not substantially identical to one asserted in original complaint, motion to dismiss it properly entertained]). However, having raised a new argument on reply concerning Tonino's standing to assert causes of action on behalf of the estate, which is not responsive to any assertion advanced

by plaintiffs in their opposition, that argument is not considered.

As the prefatory paragraph of the first amended complaint clearly reflects that Tonino, individually and as an interest holder in the Ponte Family Companies, is not included among "plaintiffs" in all but the 14th and 15th causes of action, there is no basis for dismissal.

IV. CONCLUSION

For all of the foregoing reasons, it is hereby

ORDERED, that plaintiffs' motion for leave to reargue is denied; it is further

ORDERED, that defendants' cross motion to dismiss is denied; it is further

ORDERED, that defendants file and serve an answer to the first amended

complaint within 30 days of the date of this decision; and it is further

ORDERED, that the parties appear for a preliminary conference on November 20, 2019 at 2:15 pm at 60 Centre Street, Room 341, New York, New York.

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BARBARA JAFFE, J.S.C.

9/20/2019  
DATE

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE